In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 569

PACIFIC POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

Petitioner asks that, if this Court grant the petition for certiorari filed by the Department of Fish and Game of the State of California in No. 506, this Term, it also grant review of the further question whether the Federal Power Commission was warranted in requiring the present petitioner, as a condition of receiving a hydroelectric-project license, to construct, and reimburse the State for 80 percent of the cost of operating, certain fish hatchery facilities.

We have filed a brief in opposition to the Department's petition. We believe the present petition is likewise without merit, and that it should be denied even if the Department's petition is granted.

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Petitioner's primary claim is that the court below abrogated the agreement between petitioner and the Department settling a dispute between them in holding that petitioner was not relieved by the agreement of all obligation to pay the operating expenses of the hatchery. However, in the discharge of its statutory duties, a federal administrative agency is not bound or restricted by the private contracts of parties appearing before it. *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 363. The rule is no different where one of the parties to the contract is a State, since the Federal Power Act entrusts the protection of the public interest, including that of the citizens of California, to the Federal Power Commission. *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 449; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 182.[1]

[1] The petition also challenges the requirement imposed by the Commission that petitioner convey the hatchery to the State rather than retain operating control. As the court below in its earlier opinion observed, however (Pet. App. 9–10), no contention that petitioner should be permitted to operate the hatchery itself was urged in an application for Commission rehearing, and no evidence was presented as to petitioner's willingness or ability to conduct such operation in the public interest. Petitioner having made no effort to raise the question before the Commission, the contention may not be considered on judicial review. See Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b); *Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 307; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 157.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
Federal Power Commission.

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